Supreme Court, U.S.
FILED
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No. 97-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, et al.,

Petitioners,

– v. –

KAREN FINLEY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF VOLUNTEER LAWYERS FOR THE ARTS AND VARIOUS ARTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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Arena Stage
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Chicago Symphony Orchestra
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Los Angeles County Museum of Art
Los Angeles, California

Mid America Resources
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Northwest Lawyers and Artists, Inc.
Portland, Oregon

Toledo Volunteer Lawyers for the Arts
Toledo, Ohio

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QUESTION PRESENTED

Whether 20 U.S.C. § 954(d)(1) (1994), which imposes the criteria of "general standards of decency and respect for the diverse beliefs and values of the American public" on a National Endowment for the Arts funding program designed to support a diverse range of private expression, is unconstitutionally viewpoint-based and vague.

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INTEREST OF THE *AMICI CURIAE*

Amici Volunteer Lawyers for the Arts, Albany/Schenectady League of Arts, Inc., Mid America Arts Resources, Northwest Lawyers and Artists, Inc., and Toledo Volunteer Lawyers for the Arts are not-for-profit organizations that provide legal and educational services to artists and art organizations with limited financial resources. *Amicus* New York Artists Equity Association, Inc. is a not-for-profit support organization and a resource network, which educates visual artists. Some of the *amici*, as well as many of the artists and organizations they serve, receive funding from the National Endowment for the Arts. *Amici* Arena Stage, Chicago Symphony Orchestra, Los Angeles County

Museum of Art, and Walker Art Center are prominent not-for-profit visual, musical, theatrical and dance institutions throughout the United States, all of which receive, and some of which depend upon, funding from the National Endowment for the Arts. These organizations were founded and exist because they believe in the importance of fostering the creation, preservation, and presentation of art in a democratic society.

Amici urge the Court to affirm the decision of the Ninth Circuit that 20 U.S.C. § 954(d)(1) violates the First Amendment. *Amici* submit this brief to emphasize that art should receive the most stringent First Amendment protection because of its vital role in challenging the status quo, and that Congress's decision to limit funding by the National Endowment for the Arts in section 954(d)(1) to "general standards of decency and respect for the diverse beliefs and values of the American public," manipulates, and thereby chills, the marketplace of expression. Section 954(d)(1) violates the First Amendment.

The *amici* have obtained and filed the written consents of the parties to the filing of this brief pursuant to Rule 37(3)(a) of the rules of this Court.

SUMMARY OF ARGUMENT

This Court has not often had the opportunity--presented here--to rule on the place of art in the First Amendment's pantheon of freedoms. Art plays a distinctive and irreplaceable role in society. By posing new world views, art challenges status quo assumptions and thus checks the potentially propulsive power of social institutions, including the power of government. Because of art's inherently challenging qualities, the manipulation of the marketplace of art has long been a hobby of tyrannical governments, and a temptation of democratic governments.

Liberty is most secure when the marketplace of speech is vigorously protected from government control. Unquestionably,

the government[1] has the ability to manipulate that marketplace when it exercises the enormous power of its purse. To check that power, the First Amendment requires the government, when it acts as a financier in the marketplace of art, to act neutrally to ensure the preservation of a marketplace of expression that is "uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The law at issue in this case, 20 U.S.C. § 954(d)(1) (1994), limits the money paid by the National Endowment for the Arts ("NEA") to those artists who propose works that meet "general standards of decency and respect for the diverse beliefs and values of the American public." It was enacted solely because public officials oppose the world views posited by certain artworks, and it chills the marketplace of artistic expression by discriminating between viewpoints.[2] *Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Section 954(d)(1), which skews artistic incentives toward particular views favored by Congress, discriminates against plainly legitimate artistic themes. Section 954(d)(1) contravenes the First Amendment and should be invalidated.

---

[1] This case involves only the First Amendment's limitations on the federal government's financing of the art marketplace. Whether the states labor under similar restraints under the Fourteenth Amendment's due process clause, which incorporates the First Amendment, is not under review.

[2] This brief limits its argument to the role of art in a democratic society and to the viewpoint discriminatory aspects of section 954(d)(1), but it is worth noting that the vagueness of the law "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) (invalidating Communications Decency Act's prohibition on sending "indecent" communications by means of telecommunications devices to persons under age 18).

ARGUMENT

I. ART PLAYS A PIVOTAL ROLE IN THE ACHIEVEMENT OF LIBERTY IN OUR CONSTITUTIONAL SCHEME

Like religion and philosophy, art is a counterweight to government's hegemony. Because art, even nondiscursive and abstract art, can challenge existing world views, it provides the governed the power to question entrenched institutions. Art's power is evident in the history of government attempts to coerce the art marketplace by defining permissible versus forbidden artistic expression. This history is pronounced in totalitarian societies, and not absent from our own. *See, e.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 331, 110 Stat. 1321-209 (1996) (prohibiting NEA funding any work that "denigrates the religious objects or religious beliefs of the adherents of a particular religion, or depicts or describes, in a patently offensive way, sexual or excretory activities or organs").

A. Art's Challenge Capacity

Art has the unique capacity to evoke an experience never had, a world never seen. In Henry James' words, "a work of art . . . makes it appear to us for the time that we have lived another life--that we have had a miraculous enlargement of experience." Henry James, *Theory of Fiction* 93 (James E. Miller, Jr. ed., 1972). It therefore provides a depth of understanding that purely didactic speech cannot. Wolfgang Iser, *The Act of Reading: A Theory of Aesthetic Response* 70 (1978). By conjuring up a reality not previously perceived, art poses a challenge to its participant's existing perceptions of life, power, and reality. Although art may convey an explicit and readily comprehensible message, its challenge function also lies in its ability to communicate nondiscursively. Unlike didactic speech, art permits the participant to *experience* a different world without cost and

without risk. *See generally* Marci A. Hamilton, *Art Speech*, 49 Vand. L. Rev. 73 (1996).

Art does not simply provide a single moment of aesthetic bliss but rather turns us away from one reality to a new reality. Each of us lives with particular views of the world. Whether literary, visual, auditory, or kinaesthetic, artistic works turn the familiar into the unfamiliar and vice versa. The encounter with an artistic work drives a wedge into a previously closed mental system by compelling the participant to re-examine and reinterpret preconceptions.[3] Therein lies art's power, its threat to the status quo, and its value in a democratic society.

Art's power does not always reveal itself at the moment the artwork is perceived. Most of us have read literary works in our youths that, at the time of the encounter, appeared to have little relevance in our limited sphere. Yet, we have carried the work with us for years, not knowing that it would change our lives or our views at a later date. The value of art lies not merely in our first experience of it, but also in its capacity to be a future, potent, and immanent tool of critique. *See* Hamilton, *supra*, at 96. Because of its latency, the power of any one artistic experience is immeasurable over the course of a lifetime. A diverse store of artistic experiences provides an invaluable arsenal to protect against the "bewitchment of one's common sense" by society's potent and prevailing powers, including those of the government. *Id.*

---

[3] A striking recent example is how Matthew Bourne's "Swan Lake," which casts bare-chested males as swans (including the lead swan in black leather) and explores the prince's Oedipal longings for his mother, shook the foundations of traditional ballet. Bourne's work met with severe criticism, as well as acclaim. *See, e.g.*, Christopher Bowen, *Matthew Bourne: Giving the Classical a Shot of Irony*, Dance Magazine, May 1, 1997, at 52. This new take on an accepted icon in the ballet "has taught us not only to see but also to hear the ballet differently." Chris Pasles, *Dance Review Idealism and a "Cruel World" from American Ballet Theatre*, L.A. Times, Aug. 1, 1997, at F26.

It follows from the nature of art that those who hold power, including those in the government, have strong incentive to structure the marketplace of art and to use specific art to their own ends.

B. The Power of Art's Challenge Function Is Evidenced by Governmental Attempts To Impede Its Effect

Art's capacity to threaten entrenched power structures is documented in the repeated attempts by totalitarian governments to suppress art. As an extreme example, witness Nazi Germany. What stands between the experience with art in the United States and that in Nazi Germany is the extraordinary success of our constitutional scheme in curbing the temptation to manipulate the marketplace of expression, including art.

In aid of its efforts to purge itself of those deemed racially impure, Nazi Germany censored all art that would not assist Hitler's ideological goals, and exercised control over the distribution of art in order to control the emotions of the people. *See* 143 Cong. Rec. H10,943 (daily ed. Nov. 13, 1997) (statement of Rep. Leach) ("The Nazis purged state museums of impressionist, abstract, expressionist, and religious art as well as art they deemed to be politically or racially incorrect."). *See also Menzel v. List*, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) (deciding an action to recover confiscated Chagall painting designated by Nazis as example of "decadent Jewish art"); Ian Dunlop, *The Shock of the New* 224-59 (1972) (describing the Nazis' confiscation of hundreds of modern masterpieces, including works by Picasso, Chagall, and Gaugin, and displaying them in an "Exhibition of Degenerate Art"). Art not consistent with the Nazi ideology was labelled "degenerate," and its creators were banned or put to death. *See* John von Rhein, *And the Banned Played on: London's "Entartete Musik" Recordings Are Reviving Works the Nazis Loved To Hate*, Chi. Trib., Oct. 26, 1997, at 19;

Andrew Fisher, *Perspectives: A German Celebration of "Degenerate" Art*, Fin. Times, July 20, 1996, at 3.

The 1937 *Entartete Kunst* (Exhibition of Degenerate Art), which later toured the United States in 1991, was Hitler's instrument to rouse the public against so-called "degenerate" art and artists. "Part of the purpose of *Entartete Kunst* was to undermine the authority not just of well-known artists but of existing institutions of art." Matthew Collings, *Resistance Heroes of Art*, The Guardian, May 20, 1992, at 38. *See also* William D. Montalbano, *Art in a Totalitarian Age; Exhibit Explores the Warping of Creativity During the '30s and '40s*, L.A. Times, Nov. 19, 1995, at A4 (commenting that exhibit entitled "Art and Power: Europe Under the Dictators, 1930-45" demonstrates how during the 1930s "culture was such a pronounced battleground for competing ideologies that it left artists, architects and filmmakers as uncomfortable pawns").

> What drew the millions to Entartete Kunst was the revelation in a highly compressed, spectacularised form of a certain negative ideal. The Nazis claimed that . . . [what] brought the Jews to Germany as well as intellectuals, homosexuality, whores, pacifism, communism, inflation and negro jazz music, were clearly figured in the distortions, disharmony and unnatural colours of modern art.
>
> Just as degenerate art could be weeded out and eventually destroyed--to be replaced by good, pure art by German artists approved by Hitler--so could degenerate elements of society be combed out of the body of the German volk.

Collings, *supra*, at 38.

In testimony to the power of art, Nazi Germany not only suppressed artistic expression by banning numerous works, but also used specific artists' works to convey its own message. *See*

Fisher, *supra*, at 3 ("The Nazis would only tolerate artists and officials who conformed to their views of Aryan art which glorified hard work, nationalist dedication, healthy outdoor pursuits and racial purity."); Walter Goodman, *Too Brilliant for the World's Good*, N.Y. Times, July 5, 1995, at C20 (stating that when Hitler asked Leni Riefenstahl to document a Nazi party rally, which resulted in the documentary "Triumph of the Will," he "did not want a political film; he wanted an artistic film"). By extinguishing "degenerate" art, Nazi Germany effectively eliminated the challenge that it could pose to the Nazis' favored art.

Similarly, the "thought reform" or "persuasion" experiments in China attempted to eradicate a panoply of art forms for the purpose of securing the power of the ruling elite. "All information from the West [was] censored and all unorthodox ideas [were] excluded from the carefully co-ordinated complex of media." Edgar H. Schein et al., *Coercive Persuasion: A Socio-psychological Analysis of the "Brainwashing" of American Civilian Prisoners by the Chinese Communists* 46 (1961).

The same impulse was evident in the Eastern bloc countries. For decades, the citizens of Eastern Europe lived under oppressive government (and political party) structures that suppressed and marginalized art and artists.

> Freedom of public expression [was] inhibited by the centralized control of all the communication media and of publishing and cultural institutions. No philosophical, political or scientific view or artistic activity that departs ever so slightly from the narrow bounds of official ideology or aesthetics [was] allowed to be published. . . no open debate was allowed in the domain of thought and art.

Id. app. at 218. Eastern European governments attempted to control art because it was a societal force that permitted the people to see beyond the oppression prevalent in their daily lives. *See, e.g.*, Shermakaye Bass, *A Man of Art and Letters*, Dallas Morn. News, Jan. 31, 1995, at 1C (quoting mail artist John Held, Jr.'s observation that "'mail is the way people in Eastern Europe were finding out about Western culture and art in the '60s, '70s and '80s . . . [and] it was through the hope people got through mail art contacts that [communism] toppled'").

Suppressed artists and their art paved the path to liberty in Eastern Europe. *See* Jiri Ruml, *Who Really Is Isolated, in The Power of the Powerless: Citizens Against the State in Central-Eastern Europe* 181 (Paul Wilson trans., John Keane ed., 1985) (stating that the Czech reform movement was peopled by "actors banned from acting, singers and musicians condemned to silence, . . . writers and academics forbidden to publish, . . . [and] artists with no opportunity to exhibit," among others); Charles Champlin, *The Blessings of Liberty*, L.A. Times, Dec. 28, 1989, at F1 (observing the significant role of artists in the fall of Communism, and comparing the role of Eastern European writers with that "played by Tom Paine and other firebrands of freedom in the American Colonies immediately after 1776"); John Russell, *Tyrants Fall; Art Endures*, N.Y. Times, Feb. 18, 1990, § 2 (Arts and Leisure), at 1 (citing specific instances of how "the novelist, the playwright, the poet, the composer, the movie maker and sometimes the painter or sculptor have been chipping away ever since the end of World War II at the monolithic political structure"). The Eastern bloc learned the hard way that which is enshrined in our constitutional structure: dissenters must be permitted to speak and be heard, or their suppressed energies can erupt into revolution.

The American experience itself teaches that art plays an essential and constructive role in fomenting change and challenging accepted wisdom. Abraham Lincoln acknowledged art's power to challenge powerful social forces when he met Harriet Beecher Stowe, the author of *Uncle Tom's Cabin*, and remarked "[s]o this is the little lady who made this big war." Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 3 (1962). Our art, particularly our music and

films, have had tremendous impact outside our borders in fighting against totalitarian governments. *See, e.g., All Things Considered,* Oct. 31, 1997, *available in* 1997 WL 12834175 (interviewing Chinese piano player who told of his father, an opera singer, who was prohibited from performing Western opera, and further noting that Rock and Roll in the early 1980s was a "major influence to Chinese young people. . . [T]hat's the way they try rebelling [against] the government"). Yet, despite United States' artists' contributions to the world, censorship and viewpoint discrimination are not unknown in this country. *See* Marilyn J. Flood, *Lyrics and the Law: Censorship of Rock-and-Roll in the United States and Great Britain,* 12 N.Y.L. Sch. J. Int'l & Comp. L. 339, 400-24 (1991); *see also United States v. Two Obscene Books*, 99 F. Supp. 760, 762 (N.D. Cal. 1951) (concluding that Henry Miller's *Tropic of Capricorn* and *Tropic of Cancer* could be excluded from the United States by Customs officials), *aff'd sub nom. Besig v. United States*, 208 F.2d 142 (9th Cir. 1953); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 183-84 (S.D.N.Y. 1933) (rejecting government's contention that James Joyce's "preoccupation with sex in the thoughts of his characters" rendered *Ulysses* subject to forfeiture and destruction), *aff'd sub nom United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934); *Commonwealth v. Friede*, 271 Mass. 318, 323, 171 N.E. 472, 474 (1930) (affirming criminal conviction for the sale of Dreiser's *American Tragedy*).

The temptation to encourage some world views through art and not others is pronounced in totalitarian regimes, but certainly not peculiar to them. Even in the United States, our representatives have succumbed to this temptation. In 1996, the Congress limited funding of new artworks through the NEA to prohibit funding any work that "denigrates the religious objects or religious beliefs of the adherents of a particular religion, or depicts or describes, in a patently offensive way, sexual or excretory activities or organs." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 331, 110 Stat. 1321-209. *See also* 143 Cong. Rec. S9348 (daily ed. Sept. 15, 1997) (proposing amendment, which was subsequently rejected, again to include

this language in the 1998 appropriations legislation); 143 Cong. Rec. H4699 (daily ed. June 26, 1997) (statement of Rep. Souder) (noting "NEA funding of obscene and anti-Christian art"); 139 Cong. Rec. E2330 (daily ed. Sept. 30, 1993) (statement of Rep. King) (criticizing art funded by the NEA that is "anti-Christian, obscene, and blatantly political"); 137 Cong. Rec. S13,267-68 (daily ed. Sept. 19, 1991) (statement of Sen. Helms) (referring to "the degenerate so-called 'art' that the NEA has in fact supported with public funds").

In the American constitutional scheme, the First Amendment exists to squelch such impulses. This Court bears the responsibility for drawing the line on such impulses.

C. The First Amendment Ensures That Art Is a Counterweight to the Federal Government's Hegemony

One telling hallmark of a free society is the "'breathing space'" afforded art. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)). While art always has the potential to bring government to account, societies can be measured according to the extent they permit art to wield its singular power in the polity. The First Amendment ensures that art can fulfill its liberty-reinforcing role in the United States.

The First Amendment proceeds from the position that any form of censorship, whether accomplished through a complete ban or through viewpoint discrimination, disrupts the marketplace of expression to the detriment of the polity and the people. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through

free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs . . . sets us apart from totalitarian regimes.") (citation omitted); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from [the overthrow of government], the more imperative is the need to preserve inviolate the constitutional right[] of free speech . . . to maintain the opportunity for free political discussion . . . ."). The First Amendment's free speech guarantee prevents the federal government from co-opting or coercing the marketplace of expression. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right."); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government.") (citation omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). These bedrock First Amendment principles apply to art in all of its forms. *See* Hamilton, *supra*, at 102-12 (discussing the First Amendment's protection of all forms of art, including the nondiscursive and nonrational, because art's communication capacity is not limited to or dependent upon rational faculties); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably

shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll.") (citations omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

Along with religion and philosophy, art is a hedge against ideological totalism. In the words of President Kennedy, "'[w]hen power leads man toward arrogance, poetry reminds him of his limitations. When power narrows the areas of man's concerns, poetry reminds him of the richness and diversity of his experience. When power corrupts, poetry cleanses, for art establishes the basic human truths which must serve as the touchstones of our judgment.'" Champlin, *supra*, at F1 (quoting President Kennedy in context of discussing artists' role in the downfall of Communism in Eastern Europe). A multiplicity of world views, and the capacity of individuals to test differing views, arms citizens as they face the prevailing powers in the society and in government. The American constitutional scheme recognizes the value of the individual and aims to protect a thriving marketplace of expression for the purpose of preventing the tyranny feared by the Framers. The marketplace of new and emerging artworks plays a vital role in keeping that tyranny at bay.

II. THE FEDERAL GOVERNMENT, ACTING AS A FINANCIER IN THE MARKETPLACE OF ART, HAS VIOLATED THE FIRST AMENDMENT BY FAILING TO ACT NEUTRALLY AND DISCRIMINATING BETWEEN ARTISTIC THEMES

Although the federal purse can be used to benefit the public, it can also be employed as a weapon to coerce the American polity. *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987)). Much of this Court's First Amendment jurisprudence indicates that the opposite of coercion is neutrality. For example, the neutrality principle has been cited frequently in this Court's First Amendment Religion Clause jurisprudence. *See, e.g., Rosenberger v. Rector and*

Visitors of the Univ. of Va., 515 U.S. 819, 839-44 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696-97 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-14 (1993); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-35 (1993); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-54 (1976). At the same time, this Court has identified a neutrality requirement in its First Amendment Speech Clause cases. *See Rosenberger*, 515 U.S. at 833-34 (requiring neurtrality when government expends funds "to encourage a diversity of views from private speakers"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)) (observing that the government may not deny subsidization to certain forms of speech so as to "'ai[m] at the suppression of dangerous ideas'"). This case invites the Court to take the next logical step, and to declare that art speech, like religious speech, is protected against government attempts to favor some views over others.

The First Amendment prohibits the government from using the power of the purse adversely to manipulate First Amendment interests, whether those interests are religious, political, or artistic. Thus, when a constitutional challenge is raised to the federal government's actions in the marketplace of artistic expression, the appropriate question under the First Amendment is whether the government has acted neutrally.

A. When the Government Acts As an Arts Financier, It Must Act Neutrally

Federal government decisions to fund the creation of new works of art by pouring funds into the otherwise private market of art, cast the government as a financier in the open market. Acting

as a financier, the government has the capacity to affect the mix of new works to be created. Its actions in this role, therefore, demand close First Amendment analysis. *Rosenberger*, 515 U.S. at 833-34 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)) (recognizing that when the government "appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes," but when the government "expends funds to encourage a diversity of views from private speakers," the government must act neutrally). *Cf.* 20 U.S.C. § 953(b) (1994) ("The purpose of the [NEA] shall be to develop and promote a broadly conceived national policy of support for . . . the arts in the United States . . ."). To avoid the detrimental market-structuring of which the government is capable and to which it is tempted, the government-financier must base its funding decisions on neutral principles.

B. Section 954(d)(1) Is Not Neutral and Therefore Violates the First Amendment.

Under the law at issue in this case, which governs the way in which the NEA distributes government money to artists in the open market, the government is acting as a financier in the marketplace of new art.[4] While private financiers have the right to fund only the art they like, the First Amendment places restrictions on the federal government's operation in the marketplace of art because of the obvious danger that the government may skew the marketplace toward particular viewpoints and thereby chill other, important and challenging viewpoints. Unlike the chilling of other forms of expression, the chilling of art endangers not only suppression of its explicit message, but also that of its noncognitive aspects, which may be just as potent in challenging entrenched institutions and unexamined, widely accepted viewpoints.

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[4] The term "new art" includes new productions of existing works, as well as the creation of new works. Of course, plenty of existing works, such as "Lolita," would not meet the decency standard of section 954(d)(1).

Neutrality is the touchstone for constitutional inquiry when the federal government acts as arts financier in the open market for art. *See Rosenberger*, 515 U.S. at 839. *Cf. Church of the Lukumi Babalu Aye*, 508 U.S. at 533-34 (defining neutrality in the religion context); *Employment Div., Dep't of Human Resources*, 494 U.S. at 878-79 (stating that valid and neutral laws of general applicability do not violate the Free Exercise Clause). Section 954(d)(1) requires the government to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in judging artistic merit. By limiting arts grants to those that satisfy the standards of morality codified in section 954(d)(1), Congress intended to favor some viewpoints--those the government approves--over others. *See Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)). Section 954(d)(1) violates settled First Amendment principles by shifting market preferences toward specific artistic themes and away from others. "'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech."'" *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980)) (Stevens, J., concurring in judgment).

Section 954(d)(l) would require the NEA to engage in viewpoint discrimination, and thus coerce the mix of expression that appears in the arts marketplace.[5] It is an attack on the liberty that is engendered by an "uninhibited, robust, and wide-open" marketplace of art. *New York Times Co.*, 376 U.S. at 270. The constitutional defect of the selective funding at issue here is not outright suppression; the federal government has not decreed that certain artworks must be banned. Rather, the government has, in

[5] The district court in *Finley* enjoined section 954(d)(1) finding it vague under the Due Process Clause and overbroad under the First Amendment. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1476 (C.D. Ca. 1992), *aff'd*, 100 F.3d 671 (1996), *cert. granted*, 118 S. Ct. 554 (1997).

its role as participant in, and leader of, the arts marketplace, skewed the market away from certain works--those that do not reflect the "general standards of decency" or that do not express "respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1).[6] With these requirements, the government is endorsing particular aesthetic viewpoints and condemning others.[7] This is evident not only in the text of the law but also in its legislative history.[8]

[6] The Painted Bride Art Center in Philadelphia was established to showcase avant-garde work. In response to the tenor of federal and private funding, the Bride attempted to recast itself as a community arts outreach program. The realization that it had forsaken its artistic mission for the government's political mission persuaded the Bride to forgo government funding. *See* Stephan Salisbury, *The Painted Bride's Going Fiscally Lean As It Zeroes in on Its Artistic Mission Center To Shift Focus from Community Outreach To Presenting Cutting-Edge Work*, Phila. Inq., Sept. 25, 1995, at D01.

"The art world's version of affirmative action . . . [has] had a profoundly corrosive effect on the American arts--pigeonholing artists and pressuring them to produce work that satisfies a politically correct agenda rather than their best creative instincts." Jan Breslauer, *The NEA's Real Offense: Agency Pigeonholes Artists by Ethnicity*, Wash. Post, Mar. 16, 1997, at G01.

[7] *See, e.g.*, 143 Cong. Rec. S9478 (daily ed. Sept. 17, 1997) (statement of Sen. Ashcroft) ("[T]he 'Blood of the Mugwump' volume is one which is frankly so repugnant to the values of America--it talks about a clan of Catholic, gender-shifting vampires who get infections, viruses, by reading prayer books. . . . I really cannot imagine this is the kind of thing we want to suggest to the American people."); 136 Cong. Rec. H9420-21 (daily ed. Oct. 11, 1990) (remarks of Rep. Marlenee) (stating that proposed NEA legislation was a smokescreen to permit "the junkies to continue to peddle their depraved and sadistic wares with impunity," and refusing to attach his name "as a patron to a legacy of art that is degenerate, obscene, perverted, pornographic, and exceedingly offensive").

[8] "Previous floor debate in support of content restrictions in both the House and Senate clearly suggests that its proponents are seeking to restrict support for projects which involve certain subjects and issues, approaches to topics, points of view, and groups of individuals." 139 Cong. Rec. S11,670 (daily ed. Sept. 14, 1993) (reading, into the record, materials prepared by congressional staff for responses to possible floor amendments pertaining to NEA funding).

C. The Impact of Section 954(d)(1) on the Marketplace of Art Is Potentially Enormous

The impact of section 954(d)(1) is potentially enormous. If the government finances only those works that are decent and that express respect for diversity, it disfavors a vast array of valuable and important works. This poses a substantial risk to the marketplace of art. Because society's views on decency and diversity are typical fodder for any artist's mill, the federal government has discriminated against a remarkable array of artists and their works. Indeed, the importance of art in a democracy is that it has the capacity to bring seemingly settled presuppositions into a new and perhaps unforgiving light. *See supra*. These standards, if in effect, would exclude works by renowned authors and artists who have plumbed the depths of human existence by revealing and dissecting humanity's less than noble instincts, including Marcel Duchamp, Martha Graham, Henry James, James Joyce, Balthazar Klossowski de Rola (Balthus), Edouard Manet, Henri Matisse, Henry Miller, Vladimir Nabokov, Eugene O'Neill, Pablo Picasso, Aleksandr Solzhenitsyn, Anna Sokolow, Mark Twain, and the impressionists of the 1870s.

Because private funding of the arts often follows the NEA's choices, the effect on the art market of this coercive element is much greater than the government has admitted.[9] *See* Brief for

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> [T]he debate which we are about to embark upon is a debate about whether the Federal Government should subsidize art and should identify in the art community some things for subsidy and some things for special treatment and some things to be singled out for approval while other things have to survive or fall based on their quality in the marketplace.

143 Cong. Rec. S9465 (daily ed. Sept. 17, 1997) (statement of Sen. Ashcroft).

[9] Because private funding tends to be relatively conservative,

Petitioner, *National Endowment for the Arts v. Finley*, No. 97-371, 1998 WL 11935, at *38 n.12 (U.S. Jan. 9, 1998) ("The NEA's funding program is unlikely to [manipulate or skew the marketplace of ideas] because it provides only a small fraction of the total available funding for the arts."). As an empirical matter and as a result of the NEA's funding structure, the federal government's funding decisions lead and influence private funding decisions.[10] In a world of scarce resources, artists will

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government funding operates as a funnel for the scope of works in the marketplace. *See* Nadine Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* 103 (1995) ("Support from the NEA has served as a seal of approval for art, which in the past had been seen as a 'safe' investment or contribution for conservative corporate and individual donors."). *See also* 143 Cong. Rec. S9328 (daily ed. Sept. 15, 1997) (statement of Sen. Bennett) ("The National Endowment for the Arts is something like a 'Good Housekeeping Seal of Approval' put on a local effort which allows the people . . . to . . . say 'You see what we have here is really a class operation. It's worthy of your support, worthy of your private contributions . . . .'"); 141 Cong. Rec. S11,986 (daily ed. Aug. 9, 1995) (statement of Sen. Abrahams) (maintaining private arts funding levels requires a "national entity" that provides a "national imprimatur"); 131 Cong. Rec. H7736 (daily ed. Sept. 24, 1985) (statement of Rep. Jeffords) ("[S]upport from the Endowment[] has always represented a 'Good Housekeeping Seal' of approval which has helped generate non-Federal dollars for projects and productions.").

[10] *See, e.g.*, 143 Cong. Rec. S9476 (daily ed. Sept. 17, 1997) (statement of Sen. Feinstein) ("Every $1 spent by the NEA attracts $12 to the arts from other sources.").

NEA funding of a given project necessarily precipitates funding from other sources because the NEA can only grant up to 50% of the total cost of a project or production to groups, public agencies, and private nonprofit organizations. 20 U.S.C. § 954(e), (p)(3) (1994). *See* Norm Brewer, *Senate a Friend to NEA: No Funding Halt*, Chi. Sun-Times, Sept. 18, 1997, at 27 ("State arts councils oppose increasing block grant money because projects endorsed by the NEA can generate more matching funds from the private sector."); Breslauer, *supra*, at G01 ("[T]he role of the NEA, paradoxically, is both to follow and to lead private funders. All NEA grants must be matched by private money--and yet the NEA won't actually release a grant until it is assured that the private funds are forthcoming.").

craft their proposals, and therefore their artworks, to receive the money available.[11] The negative effect of section 954(d)(1) is further magnified by the NEA's practice of considering a funding applicant's prior work before awarding a grant. Joint App. 18, 74, 81. Thus, if an artist has any present or future plans to submit a grant proposal to the NEA, the judgment of section 954(d)(1) would mold all of the artist's creative work.

At the present time, approximately five percent of the arts funding in the United States, slightly less than $100,000,000, comes from the NEA. This sum, in turn, influences private funding by twelve-fold, so that more than $1.3 billion dollars induces artists to make their works consistent with "general standards of decency" and respectful of the "diverse beliefs and values of the American public."[12] These standards invite mediocrity, blandness, and homogenization, while discouraging

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The district court indicated that the matching requirement likely violates the Constitution because section 954(d)(1) affects not only NEA decisions, but also the decisions of the private entities providing the matching funds.

> An argument can be made that the decency clause constitutes a facially unconstitutional condition with respect to groups, agencies, and non-profit organizations that receive NEA funding. Because the NEA is permitted to fund only up to 50% of the total cost . . . any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial proportion of non-NEA-funded expression. However, as the NAAO have not raised this argument, the court does not address or resolve it.

Finley, 795 F. Supp. at 1472 n.18.

[11] *See supra* note 5, for examples.

[12] 143 Cong. Rec. S9488 (daily ed. Sept. 17, 1997) (statement of Sen. Hutchinson).

creative cutting-edge work. This is not good for art, it is not good for the American people, and it violates the First Amendment's injunction to preserve a robust marketplace of expression.

The coercive effect of section 954(d)(1) would, if in effect,[13] increase as the amount of NEA funding increases. The increase in funding proposed by the President's Committee on the Arts and Humanities, if subject to section 954(d)(1), would increase section 954(d)(1)'s direct coercive impact on artists and its reverberations through private funding sources markedly.[14] Section 954(d)(1)'s untoward impact on the arts market surely will be aggravated if and when the current nominee to head the NEA, who has vowed to increase funding at least five-fold, is confirmed.

While the law at issue in this case is not a complete ban on any artistic perspective, it chills art speech in a way destructive of the marketplace of artistic expression. *Cf. Reno*, 117 S. Ct. at 2344 (referring to law that "raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Rosenberger*, 515 U.S. at 835 (recognizing the danger "to speech from the chilling of individual thought and expression"). For this reason, section 954(d)(1) should be stricken and Congress should receive the message that it may not, through the exercise of its purse, coerce, chill, or manipulate the marketplace of emerging artworks that are so crucial to checking government power.

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[13] *See Finley*, 795 F. Supp. at 1476 (enjoining operation of section 954(d)(1)).

[14] "Creative America: A Report to the President," which was requested by the White House and organized by the President's Committee on the Arts and Humanities, including NEA head nominee, William Ivey, suggested that Congress increase spending for the arts and humanities from its present level of $.88 per person to $2 per person by the year 2000. Jacqueline Trescott, *Presidential Panel Calls for Doubled Cultural Funding: Report Also Recommends Private Sector Initiatives*, Wash. Post, Feb. 26, 1997, at D01. This could amount to over $500,000,000. *Clinton Asks Musicologist To Take Baton at the NEA: Arts Agency Nominee Has Nashville Roots*, Chi. Trib., Dec. 20, 1997, at 14.

CONCLUSION

The First Amendment prohibits the federal government, when it acts as a financier in the marketplace of art, from viewpoint discrimination. Section 954(d)(1) chills art speech by elevating some artistic viewpoints above others and therefore should be invalidated. The decision of the Court of Appeals should be AFFIRMED.

Dated: February 6, 1998

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